*Brutsche (Leo C.) v. City of Kent*
Majority by Madsen, J.
Dissent by Sanders, J.

No. 79252-6

SANDERS, J. (dissenting)—The issue here is whether the police can destroy property belonging to an innocent third party without incurring any liability for that destruction or, alternatively, be required to pay just compensation to the property owner who is disadvantaged for the public good. The majority, by affirming summary judgment of dismissal favoring the city, shields the government from liability for trespass as well as its constitutional responsibility to pay just compensation.

The majority correctly holds police cannot destroy private property in the search for evidence unless the destruction is absolutely necessary to conduct a complete search. Majority at 10. But then it immediately eliminates any protection given to the property owner by affirming summary judgment for the city. Under these facts a reasonable jury could certainly find using a battering ram to destroy doors rather than using an available key was unnecessary. Moreover the majority fails to recognize where the police destroy private property for a public purpose, it is a damaging requiring just compensation under article I, section 16 of the Washington Constitution.

*Trespass*

Under long established precedent police officers are liable in trespass where they do "unnecessary damage to the property to be examined" and fail to "conduct the search as to do the least damage to the property consistent with a thorough investigation." *Goldsby v. Stewart*, 158 Wash. 39, 41, 290 P. 422 (1930). Stated another way, a warrant immunizes the police from liability for trespass *but only* where the police do no more damage to the property than is absolutely necessary for a thorough search. The only question then is whether the damage done by the police officers during the search was *necessary* to complete the search. If the damage was *not necessary* to the search, the police are liable in trespass.

Analyzing this question we must first recall this issue was presented in a motion for summary judgment. Summary judgment is appropriate "only when reasonable minds could reach but one conclusion from" the facts, construing those facts and inferences in favor of the nonmoving party, Leo Brutsche. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995). Summary judgment must be denied if a reasonable person could find police battering down Brutsche's doors was *not necessary* for a complete search of Brutsche's property.

Construing the facts most favorably to the nonmoving party, a reasonable person could certainly determine battering down Brutsche's doors and destroying the door frames was not necessary to complete the search of his property. Brutsche offered to unlock all of the doors on his property for the officers. He also offered the officers keys with which they could unlock all the doors themselves. The officers spurned Brutsche's offer to open the doors without damage. They chose instead to use a battering ram. Nonetheless the majority holds the officers' actions were necessary to the search *as a matter of law*. Majority at 9.

The majority asserts the officers' actions were necessary as a matter of law because of the asserted danger police officers might face when serving a warrant. Majority at 16. However even if serving warrants may sometimes be a dangerous task, that does not abrogate the officers' responsibility under *Goldsby* to serve warrants with no more damage to private property than is reasonably necessary.[1] At the least whether the asserted (but nonexistent) danger allegedly faced by the officers required destruction of the door frames rather than simply unlocking the doors is a question of fact for a jury consistent with our constitutional requirement that the right to trial by jury remain "inviolate." Const. art. I, § 21; *LaMon v.*

[1] This is true whether Brutsche was barred from the search scene or evidence was in danger of being destroyed.

*Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989).

That the suspect barricaded himself in one building to possibly destroy evidence or arm himself may allow an inference that battering down the door to that particular building was necessary to effectuate the warrant. But that is not the only inference, as even that breach was arguably not strictly necessary as Brutsche offered the police a key to open that door as well. Moreover how a suspect barricading himself in one building justifies battering down doors to other outbuildings, especially after the barricaded suspect was arrested, is left to the imagination. There was simply no evidence, beyond the speculation of the officers, the other buildings contained individuals at all, much less those seeking to harm the officers or destroy evidence. Whether baseless suspicion justifies destruction of private property is at least a question of fact for the jury.

*Just compensation is required*

Not only does the majority err when it affirms summary judgment dismissing the trespass claim, it also errs by rejecting Brutsche's alternative claim for just compensation for damaging his property. Article I, section 16 of the Washington Constitution provides in part, "No private property shall be taken or damaged for public or private use without just compensation having first been made." By this provision the framers gave us a simple, clear framework to determine when the

State must compensate a property owner. Was this private property? Was it taken or damaged by the State? If the answers are yes, then the property owner must be compensated.

There was no claim these doors frames were a nuisance or otherwise harmful. A plain reading of article I, section 16 mandates Brutsche be justly compensated.[2] I agree that "taking" or "damaging" does not occur in the constitutional sense where the damage is occasioned by a traditional use of the "police power," however this was not an exercise of the police power but rather an exercise of the power of eminent domain.

The majority rejects Brutsche's takings claim based primarily on *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003). In *Eggleston*, police seized a load bearing wall from Mrs. Eggleston's house as evidence for a murder trial involving her son. *Id*. at 763-65. *Eggleston* held collection of evidence is an exercise of the "police power," which does not require compensation, rather than eminent domain, which does. *Id*. at 775. The court asserted, "[t]he gathering and preserving of evidence is a police power function, necessary for the safety and

[2]The court would do well to heed the warnings of Justice Holmes when he wrote, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

general welfare of society." *Id*. at 768. For the reasons set forth in my dissent, *Eggleston* was wrongly decided, is harmful, and should now be overruled, not extended.[3]

That court failed to recognize the important distinction between the power of the police and the "police power." Appropriating or damaging property for the public good does not absolve the State from compensating the owner, precisely the opposite.[4] That is what the takings clause is all about. We strongly rejected our new majority's opinion almost 90 years ago in *Conger v. Pierce County*, 116 Wash. 27, 33, 198 P. 377 (1921) (rejecting the argument Pierce County was not liable for damages to private property because "the private individual . . . must suffer for the public good."). *Conger* held the county was not relieved from compensating the property owner "because [the county was] acting for the good of the public, or simply on the theory that the individual must suffer for the public good. To hold that [the county] would be relieved on any of these grounds would be entirely to disregard the express provisions of our constitution." *Id.* at 35. *Conger* strongly supported protecting private property rights from encroachment in the name of the

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[3] *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

[4] *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972).

public good as "[o]ne of the greatest contributions of the English-speaking people to civilization is the protection by law of the private individual in the enjoyment of his property and his personal liberties against the demands and aggressions of the public." *Id*. at 33-34.

In essence *Conger* recognized, while *Eggleston* ignored or misperceived, "[t]he talisman of a taking is government action which forces some private persons alone to shoulder affirmative public burdens, 'which, in all fairness and justice, should be borne by the public as a whole.'" *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 964, 954 P.2d 250 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960); *accord Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)). *Eggleston* erroneously required Mrs. Eggleston to bear the entire cost of this public acquisition of her private property on her lonely shoulders, whereas this burden in fairness and justice should be shared with the public as a whole. The same can be said of Mr. Brutsche, who the majority forces to uniquely shoulder the entire burden of police destruction of his property to gather evidence for the public good. This burden must be appropriately "borne by the public as a whole"[5] to satisfy the constitutional mandate.

[5] *Armstrong*, 364 U.S. at 49.

When considering whether an exercise of the police power immunizes the State from compensating a property owner for damaging or taking his property, it is important to understand the traditional meaning of "police power." It seems elementary the police power is *not* the power of the police, but rather the power *to* police (or protect) our rights.

> The most important power surrendered to government is what Locke and others called "the executive power" and what is sometimes called the "police power." *This is the power to enforce or "police" one's rights when they have been violated by others*. Indeed, John Locke argued that it was the "inconvenience" of exercising the executive power in the state of nature that justified the creation of an "imperial magistrate" – that is, government.

Randy E. Barnett, Restoring the Lost Constitution 70-71 (2004) (emphasis added); *see also* Christopher G. Tiedeman, A Treatise on the Limitations of Police Power in the United States 4-5 (1886);[6] Cato Handbook For Congress: Policy

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> [T]he police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim, *sic utere tuo, ut alienum non lædas*. . . . Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions.

Tiedeman, *supra*, at 4-5. ["Use your property so as not to damage another's; so use your own as not to injure another's property." Black's Law Dictionary

Recommendations for the 106th Congress 206 (Edward H. Crane & David Boaz eds., 1999) (the police power is "the power each of us has in the state of nature to secure his rights"). For example, if the police acquire land for a police station, which ultimately serves the ends of law enforcement, such is clearly an exercise of the power of eminent domain, requiring just compensation. If, however, government destroys property because that property is harmful, or used in a harmful way, that is not an acquisition (or damaging) for the public good but an abatement of a nuisance, requiring no compensation. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928).

Even if we accept, which I do not,[7] that the police power of the State is limited only by the requirement it "reasonably tend to promote some interest of the State, and not violate any constitutional mandate,"[8] this does not answer the question of whether this action falls under the "police power" rather than eminent domain.

"Police power" historically has allowed the government to physically destroy,

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1757 (8th ed. 1999).]

[7] As has been noted, "[t]his broad definition of the police power appears overinclusive" and has significantly expanded in scope since the adoption of the constitution. Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 Wash. L. Rev. 495, 506 (2000).

[8] *CLEAN v. State*, 130 Wn.2d 782, 805, 928 P.2d 1054 (1996).

take, or damage, private property "to avert an immediate danger" posed by the property itself.[9] It is this power which allows the state, without compensation, to raze houses in an effort to contain a fire[10] or destroy diseased cedar trees in an effort to prevent the disease from spreading.[11] But that is not our present case. Here the doors and the jambs in and of themselves presented no danger to the community justifying their destruction.

The distinction between police power and eminent domain was specifically recognized in Washington nearly 90 years ago in *Conger*.[12] There the court defined "police power" as the power of the State to prohibit the owner of property from using his property in ways harmful to others. It held "[e]minent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public

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[9] John M. Groen & Richard M. Stephens, *Takings Law,* Lucas *and the Growth Management Act*, 16 U. Puget Sound L. Rev. 1259, 1290 (1993).

[10] *See, e.g., Bowditch v. City of Boston*, 101 U.S. (11 Otto) 16, 25 L. Ed. 980 (1880).

[11] *Miller v. Schoene*, 276 U.S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928).

[12] *Conger* is important for more than its longevity. Constitutional provisions should be interpreted as they were conceived at the time of adoption. *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826 (1945). *Conger,* decided only 32 years after adoption of the constitution, is a good indicator of the understanding of the terms nearer the time of the constitution's adoption.

use, but to conserve the safety, morals, health and general welfare of the public." *Conger*, 116 Wash. at 36. Put another way the police power allows the State to "prevent all things harmful to the comfort, welfare and safety of society." *Id*. As *Conger* drew the distinction, the police power allows only the State to prohibit the property owner from using his property in ways harmful to others to avoid the just compensation constitutional mandate.

The *Conger* distinction was supported by the Latin maxim *sic utere tuo ut alienum non lædas*[13] and by several treatises published at the turn of the 20th Century, roughly contemporaneous with the state constitution. Since constitutional provisions should be interpreted as they were conceived at the time of adoption, sources such as these are invaluable to understanding our constitutional protections. *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826 (1945). These treatises uniformly describe the police power as the ability of the State to restrict landowners from using their property to harm the public. The landowner "is . . . bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this . . . duty which pertains to the police power of the State so far as the exercise of that power affects private property." 1 John Lewis, A Treatise on the Law of Eminent Domain in the United States § 6, at 14-15

[13] *See Black's Law Dictionary*, *supra*, at 1757.

(2d ed. 1900) (footnote omitted). "[I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . ."[14] Ernst Freund, The Police Power: Public Policy and Constitutional Rights § 511, at 546-47 (1904). As stated by Judge Dillon in 1890, "[t]his power to restrain a private injurious use of property, is essentially different from the right of eminent domain. It is not a taking of private property for public use, but a salutary restraint on a noxious use by the owner . . . ." John F. Dillon, Commentaries on the Law of Municipal Corporations § 141, at 212 (4th ed. 1890). As these treatises demonstrate, the "police power" was generally understood to be the power to prevent the use of property to harm others. However where the individual was deprived of the use of his harmless property (or it was damaged) for the public good, the State exercised its power of eminent domain.

This distinction between the police power and the power of eminent domain, vital and vibrant as it was at the time the constitution was adopted, still remains today. Professor Stoebuck reflected this distinction in his influential work, William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 569 (1972), clarifying when the State acquires property for the public good, it exercises

[14] The Washington Constitution broadens the traditional eminent domain protections to include property that is damaged, as well as taken, by the State. Const. art. I, § 16.

its power of eminent domain and not its police power. Other experts continue to recognize this distinction as well, noting eminent domain is "the power to take property for public use upon payment of just compensation," whereas the police power is the "power to secure rights, through restraints or sanctions, not some general power to provide public goods." Cato Handbook for Congress, *supra*, at 206. Of importance, this court again recognized this distinction in *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 15, 829 P.2d 765 (1992), where we held the police power was exceeded where the ordinance went "beyond preventing harm." Distinguishing police power (the State's ability to prevent harm to others) from eminent domain (the State's ability to take or damage property for the public good) is based on both historical and current sources and should be followed here.

Understanding this distinction allows the "police power" to be harmonized with the power of eminent domain, maintaining the integrity of each. Conceptually we must recognize property "as a legal term property denotes not material things but certain rights." Morris R. Cohen, *Property and Sovereignty,* 13 Cornell L.Q. 8, 11-12 (1927-28). However those rights simply do not include the right to use property in a manner which harms the public. *See Mugler v. Kansas*, 123 U.S. 623, 662-63, 8 S. Ct. 273, 31 L. Ed. 205 (1887) ("Nor can it be said that government interferes with or impairs any one's constitutional rights . . . of property, when it determines

that the manufacture and sale of intoxicating drinks . . . are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."); *see also Conger*, 116 Wash. at 36 (citing 1 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 6 (2d ed. 1900)). As such, no property right is infringed when the State prohibits use of the property in a way that harms the public or creates a nuisance; therefore no property has been taken and hence no compensation is required. *See*, *e.g.*, *Mugler*, 123 U.S. at 662-63. On the other hand, when government takes or damages an actual right on has in his property, compensation is mandatory. Const. art. I, § 16 ("No property *shall* be taken or damaged . . . without just compensation having been first made." (emphasis added)).

The majority's analysis is also squarely at odds with the Texas Supreme Court's sensible outcome in *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980). There the owners of a house sought compensation after their house was set ablaze by police officers in an effort to capture fugitives hiding in the house. *Id*. at 789. The Texas court properly rejected the assertion that destroying the property "for the safety of the public" was a proper exercise of the police power and mandated just compensation. *Id*. at 793. However our majority would apparently abandon this sensible outcome to reach the absurd conclusion that the property owner should bear

the entire loss of their home, even though they were innocent of any wrongdoing and the house was burned for the public good of law enforcement. I agree with the Texas court when it held, "innocent third parties are entitled by the Constitution[15] to compensation for their property." *Id*. Once again, an innocent property owner should not be forced "'to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan*, 512 U.S. at 384 (quoting *Armstrong*, 364 U.S. at 49).

For these reasons Brutsche's constitutional taking or damaging claim falls squarely within article I, section 16, requiring the State to justly compensate Brutsche for the property destroyed during the search.

The trial court's summary judgment should be reversed to reinstate Brutsche's trespass claim. It is at least a question of fact whether the destruction of Brutsche's property was necessary to conduct a complete search. Otherwise, damage to Brutsche's property requires just compensation pursuant to article I, section 16. This burden must in justice and fairness be borne by society as a whole because it is (allegedly) a necessary cost of law enforcement.

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[15] The case involved a provision of the Texas Constitution, which provides in relevant part, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ." Tex. Const. art. I, § 17.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice James M. Johnson